IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| INTERCOLLEGIATE BROADCAST SYSTEM, et al., | ) | |
| Petitioners | ) | |
| v. | ) | No. 02-1220 |
| JAMES H. BILLINGTON, Librarian of Congress, | ) | |
| Respondent. | ) | |

**REPLY OF THE RESPONDENT, THE LIBRARIAN OF CONGRESS, IN SUPPORT OF THE LIBRARIAN'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF STANDING**

The Respondent, the Librarian of Congress ("the Librarian"), respectfully submits this Reply in response to the Petitioners' August 14, 2002 "Opposition To Librarian's Motion To Dismiss" ("Opposition") and in further support of the Librarian's Motion to Dismiss the Petition, filed August 7, 2002. For the reasons set forth below and in the Motion, the Librarian's Motion to Dismiss should be granted and petition for review filed by Intercollegiate Broadcasting System, Inc. ("IBS") and Harvard Radio Broadcasting Co, Inc., ("Harvard") should be dismissed.

1. Petitioners first concede that the "aggrieved party" language 17 U.S.C. 802(g), is "analogous" to the substantively identical language of the Hobbs Act, 28 U.S.C. 2344 at issue in *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir.1983), a case in which this Court made clear that party status required that the entity seeking judicial review must have participated in a more than de-minimis manner before the agency itself. Not disputing the holding of *Simmons*, petitioners instead purport to rely on *Water Transport Association v. ICC*, 819 F.2d 1189, 1192 n.27 (D.C. Cir. 1987), for the argument that "[t]his Court has recognized that *Simmons'* 'more stringent standard,'" which, petitioners claim, "is not fully exportable." (Opp. at 2). Petitioners then assert

that *Simmons* should not be applied to Section 802(g) because Section 802(g) allows judicial review by "'any aggrieved party who would be bound by the determination.'" (*Id.*, quoting 17 U.S.C. 802(g)).

Petitioners' attempt to distinguish the standard established in *Simmons* is unavailing. First, as *Water Transport* itself makes plain, the "aggrieved party" language is "more stringent" because it demands more than the "general review provision of the Administrative Procedure Act," which allows judicial review of any "*person*" who is aggrieved by agency action. *Water Transport*, 819 F.2d at 1192 n.27. Both the Hobbs Act and Section 802(g) share this very same "stringent" requirement. Certainly, nothing in *Water Transport* suggests that the term "aggrieved party" should be read differently from statute to statute. Indeed, as pointed out in the Motion to Dismiss (Motion at 7), this Court has expressly found "no reason to depart" from the approach followed under *Simmons* in construing that same language in other statutory schemes. See *Jones v. Board of Governors*, 79 F.2d 1168, 1171 (D.C. Cir. 1996). Petitioners simply ignore that holding.

Equally unavailing is petitioners' oblique suggestion (Opp. at 2) that a different approach is appropriate here because Section 802(g) allows judicial to "any aggrieved party who would be bound by the determination." Petitioners apparently would read the phrase "who would be bound by the determination" to mean that judicial review is available to any person who is thus "bound," regardless of whether that person was a party. Such a reading is impossible to accept. As a matter of basic grammar, the phrase "who would be bound" plainly modifies the term 'aggrieved party" and thus, if anything, further **restricts** the class of entities entitled to seek judicial review – not expands it. See *Murphy Exploration and Production Co. v. U.S. Dept. of the Interior*, 252 F.3d 473, 483 (D.C. Cir.), *modified on rehearing*, 270 F.3d 957 (D.C. Cir. 2001) ("'rules of grammar apply in statutory construction'"), quoting *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1483 (Fed. Cir.1997). *A fortiorari*, judicial review may not be sought by *non*-parties, who can be "bound" by the Librarian's rulings under the Reform Act, just as non-parties can be "bound" by administrative decisions appealable under the Hobbs Act,

at issue in *Simmons*, or by decisions appealable under the Bank Holding Company Act, at issue in *Jones*.

2. Petitioners also err in arguing that "IBS participated below by filing a caveat with the Librarian on June 6, 2002." (Opp. at 2). That "caveat," filed long after the completion of CARP proceedings[1] and less than two weeks before the Librarian issued his decision on June 20, 2002, does not constitute "participation," much less accord IBS "party" status under Section 802(g). First, the "caveat" itself makes clear that it was a "collateral filing," intended to press legal arguments by an admitted non-party to the proceeding. (Opp., Attachment 4 at 1). Indeed, the Librarian treated the filing of this "caveat" as a non-party, *ex parte* communication which, under the Librarian's regulations, "shall not be considered part of the record for the purposes of decision." 37 C.F.R. 251.33(f)(1). See Certified Index to the Record, filed August 21, 2002. The "caveat" was thus not part of the record considered by the Librarian in reaching the decision at issue in this case and is not part of the record before this Court, where judicial review is strictly limited to the record "before the Librarian" under Section 802(g).

More fundamentally, this Court should not bestow party status on IBS due to the filing of such a "caveat." Essentially, through filing this caveat, IBS is attempting to have it both ways by submitting legal arguments to the Librarian while depriving true parties of the opportunity to brief and test those arguments in proceedings before the CARP and in formal briefing before the Librarian. Deeming such a "caveat" sufficient to confer party status would also impermissibly allows IBS to end-run the CARP proceeding and evade the litigation and the arbitration costs expressly imposed by law on parties to the CARP proceedings. See 17 U.S.C. 802(c); 17 U.S.C. 802(h)(1). This Court should not allow such an attempt to evade the unavoidable and necessary costs imposed by statute. As the Librarian's Motion points out, such evasion unfairly imposes

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[1] The CARP issued its decision on February 20, 2002. See http://www.copyright.gov/carp/webcasting_rates.html.

higher costs on others and undermines the ability of the Librarian to create the administrative record crucial to the proper functioning of this statutory and administrative scheme. See Motion at 10-12. These considerations, highlighted by the Librarian in his Motion, are ignored by petitioners.

The case law also makes clear that such "participation" is insufficient to confer "party" status for purposes of allow judicial review as an aggrieved party. The rule is that "[t]he degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transport*, 819 F.2d at 1192. Thus, in *Water Transport*, the Court held that an entity acquired party status by filing administrative comments in a very informal administrative proceeding, where the agency had merely requested "general protests of its provisional suspension of the thirty-day waiting period." (819 F.2d at 1193). In contrast, in *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1368 (D.C. Cir. 1988), this Court distinguished *Water Transport*, holding that unlike the "highly informal proceedings involved in *Water Transport*," the ICC administrative proceedings at issue in *Alabama Power* were "informal *rulemaking* in which the parties were invited to . . . make full presentations of their views." (852 F.2d at 1168). (Emphasis the Court's). In such proceedings, the Court ruled, it was not sufficient for the petitioner to present affidavits to its trade association, which in turn, presented those affidavits to the agency. (*Id.*). As the Court explained, the Court simply did not have discretion to allow such a non-party to seek judicial review. (*Id.*).

The rate making administrative proceedings at issue in this case are far **more** formal than the informal "rulemaking" at issue *Alabama Power,* and obviously even far **more** formal than the "highly informal proceedings" presented in *Water Transport.* Here, the resulting rates are legally binding and published in the Code of Federal Regulations. See 67 Fed. Reg. at 45272, promulgating 37 C.F.R. Part 261. As detailed in the Librarian's Motion (Motion at 2-4), the Reform Act and implementing regulations impose elaborate and detailed administrative proceedings. This high degree of formality is also embodied in procedural regulations (see Motion at 9), ignored by petitioners in this case, that impose firm rules governing participation

and the presentation of evidence to the CARP, which has its own set of procedural rules. See 37 C.F.R. Parts 201-205, Parts 210, 211, also published at www.loc.gov/copyright/title37. These CARP proceedings are crucial to the statutory scheme. Librarian review and subsequent judicial review is expressly limited to the administrative record thus created in those formal CARP administrative proceedings. See Motion at 9. Indeed, this Court has insisted that such participation on the record is essential to proper decision-making by the Librarian. See *RIAA v. Librarian of Congress*, 176 F.3d 528, 535-36 (D.C. Cir. 1999). Plainly, under this highly structured and formal administrative structure, the requisite "full presentation of views" (*Alabama Power*, 852 F.2d at 1168), requires full and formal participation in those CARP proceedings. Neither IBS nor Harvard claim any such participation in this case.

3. IBS also argues that it, as a trade association, has standing to represent its members in the court of appeals. (Opp. at 3). That assertion, however true, is utterly irrelevant. The fact remains that neither IBS nor any of its members were ever parties to CARP proceedings under the regulations. Specifically, IBS does not contend that it ever participated in CARP proceedings on behalf its members. IBS did not even file a notice of intent to participate, a fact that it does not dispute. While IBS may well have had standing to participate in CARP proceedings on behalf its members, IBS cannot be an "aggrieved party" for purposes of Section 802(g) where it chose never to participate in those administrative proceedings.

Perhaps in recognition of its non-participation, IBS now relies on the notices of intent to participate filed by three of its members. (Opp. at 3). This attempt to bootstrap an association into party status by reference to filings by an association's members cannot be accepted. IBS and its members are all separate legal entities. IBS is hardly the same entity as its members. In any event, IBS plainly may not derive party status from its members where its members did not, in fact, have party status on their own. Here, as IBS concedes (Opp. at 3), the three members of IBS

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[2] IBS complains(Opp. at 3) that index of entities that had filed a notice of intent to

who did file notices of intent to participate[2] expressly withdrew from the CARP proceedings without presenting a case. Under the regulations, these three IBS members were not parties to CARP proceedings, were not liable for arbitration costs under Section 802(c) and were not parties to the subsequent proceedings before the Librarian. See Motion at 2-4. Indeed, it appears that none of these three members even made the argument that they were entitled to some special dispensation from the statutory-imposed arbitration costs by virtue of the Regulatory Flexibility Act of 1980, the contention IBS now wishes to press on appeal. See Opp. at 4.

4. Finally, the Librarian is not insensitive to the plight of small businesses and the costs of arbitration that may make participation in CARP proceedings prohibitively expensive. To the contrary, the Librarian expressly requested comments on ways to encourage participation by such small entities in the CARP process. See Order of January 18, 2001 at page 4, attached as an exhibit to Attachment 4 of Petitioners' Opposition to the Motion To Dismiss. Ultimately, however, the Librarian concluded that the regulations, 37 C.F.R. 251.43(a) required that parties file a direct written case containing testimony by a witness or witnesses. See Order of March 16, 2001 at page 3, attached as an exhibit to Attachment 4 of Petitioners' Opposition ("March 16, 2001 Order"). As the Librarian explained, the purpose of the rule "is to allow full examination and cross-examination of all testimony before the CARP renders its determination." (*Id.*). The Librarian also noted that the parties bear the cost of the panel proceedings. See 17 U.S.C. 802(c) and 17 U.S.C. 802(h)(1). (*Id.*). The Librarian thus rejected the idea of amicus briefing, pressed by some entities, concluding that the merits of allowing such briefs should be explored "through the rulemaking process." (*Id.* at page 3-4). In the meantime, the Librarian encouraged small entities "to pool their resources with those in like circumstances for the submission of one or

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participate, attached as Attachment A to the Declaration of Eugenia Guiffreda filed with the Librarian's Motion, incorrectly failed to list one of its members, Monmouth University. The index, however, simply lists the names of the *services* that filed notices of intent to participate. The notice filed by Monmouth listed the name of its service as WMCX 88.9 FM. That *service* is on the index as entry 104. There was no omission.

more joint written direct cases as permitted by the rules." (*Id.* at page 4).

Remarkably, petitioners assert that on this March 16, 2001 order constituted a "denial of participation" that they have standing to appeal. (Opp. at 4). First, the Librarian's March 16, 2001 order did not "deny participation" to anyone. Rather, the order, combined with the January 18, 2001 order, simply construed the Librarian's binding regulations and made clear that those who wished to participate in CARP proceedings must comply with these regulations. Indeed, any failure to adhere to these regulations could well have ensured a challenge by other entities which were parties and which objected to any deviation from the rules. See March 16, 2001 order at 3 (noting that RIAA objected to allowing small entities to file amicus briefs). The Librarian's decision set the ground rules, but left the choice to participate entirely up the interested entities.

Second, even assuming *arguendo* that the March 16, 2001 order could somehow be construed as a denial, the only comments received on this question of participation were from Manning Broadcasting, Inc., SBR Creative Media, Inc., WCPE-FM, and Performing Artists' Society of America. See Order of March 16, 2001 at page 3. Neither IBS nor Harvard claim that they filed comments in response to the Librarian's January 18, 2001 solicitation. IBS does not assert that any its members filed comments or claim, as members, any of the entities that did file comments. Since neither IBS nor Harvard responded to the Librarian's solicitation of comments, neither may challenge the Librarian's March 16, 2001 order. See Motion at 11 & n.6.

Finally, and perhaps most fundamentally, petitioners here offer no reason that they could not have accepted the Librarian's March 16, 2001 suggestion and combined their resources to present a direct written case to the CARP, as required by the rules. Presumably, as an association, IBS has more money for such purposes than do its individual members. Certainly, IBS is now expending considerable resources in filing its belated "caveat" with the Librarian and seeking judicial review of the Librarian's decision in this Court. These same resources, in combination with the resources of other, similarly situated, entities, could easily have been utilized to comply with the Librarian's published rules. In these circumstances, the only

reasonable conclusion is that petitioners' failure to participate was due to a desire to avoid all of the statutorily-imposed arbitration costs, thereby conserving funds for a challenge in this Court. See Opp. at 4.

We respectfully submit that such a decision to flout the rules of the agency so as to concentrate resources on seeking judicial review cannot be countenanced. By doing so, petitioners have not only unfairly increased the burdens on those who did participate, but also effectively deprived the arbitration panel of the opportunity to pass on the proper allocation of the costs. For example, the panel could well have decided to allocate very little of these costs to small entities, thus making the point moot. Even if the panel had chosen to impose significant costs on small entities, IBS and Harvard, if they had become proper parties, could have sought relief from such costs by appealing the panel's decision to the Librarian and, ultimately, to this Court. Yet, by failing to exhaust these administrative remedies, IBS and Harvard have effectively deprived the Librarian and this Court of an opportunity to consider these contentions on the basis of a fully developed factual record -- precisely the sort of record demanded by the statutory scheme. See Motion at 9-10. In these circumstances, petitioners' complaints over costs should not be heard. See Motion at 11.

**CONCLUSION**

For all the foregoing reasons, and for the reasons set forth in the Librarian's August 7, 2002 Motion to Dismiss, the petition for review filed by IBS and Harvard should be dismissed for want of standing.

Respectfully submitted,

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